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JAN 19 2006

In re Application of

OFFICE OF PETITIONS

Dennis Richard Hayward et al.

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Application No. 09/595,201

: ON PETITION

Filed: June 16, 2000

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Attorney Docket Number: MAR-0003

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This is a decision on the petition filed November 14, 2005, under 37 CFR 1.181, in accordance with the reasoning of the decision in Delgar Inc. v. Schuyler, 172 USPQ 513.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.181," or, as explained in more detail below, "...under 37 CFR 1.137(a)" or (b). This is not a final agency decision.

This application became abandoned on June 2, 2001 after the applicant failed to file a timely response to the non-Final Office Action mailed March 1, 2001. Accordingly, a Notice of Abandonment was mailed October 12, 2001.

Petitioner argues that the non-Final Office Action was not received and includes copies of the file jacket and docket to establish non-receipt. Petitioner also argues that petitioner's address was included on a facsimile transmission cover sheet submitted on October 4, 2001.

A review of the file reveals that the non-Final Office Action was mailed to the address of record on March 1, 2001, but was returned by the US Postal Service on March 12, 2001 as undeliverable, that the Notice of Abandonment mailed October 12, 2001 was also returned by the US Postal Service on January 24, 2002 as undeliverable and finally that a proper change of correspondence address was not filed until July 2, 2004.

While petitioner points out that the correspondence address was included on the

facsimile transmission cover sheet submitted on October 4, 2001, it should be pointed out that, as was indicated in the Notice of Abandonment, "Applicant failed to provide the office with a proper notification of change of address specifying applicant's new address. The mere inclusion, in a paper filed in the application for another purpose, of an address differing from the previously provided correspondence address, without mentioned the fact that an address change was made, does not constitute a proper change of address notification." See MPEP sections 601.03 and 711.02(c).

As petitioner has not presented any evidence that the address of record had been changed with the USPTO at the time the non-Final Office Action was mailed, and in the absence of petitioner showing that they acted responsibly with respect to providing the USPTO with up to date addresses, the showing of record is therefore insufficient to warrant withdrawal of the holding of abandonment.

ALTERNATIVE VENUES

Petitioner may wish to consider filing a renewed petition under 37 CFR 1.137(a)¹ or 37 CFR 1.137(b),² which now provides that where the delay in reply was unintentional, a

¹A grantable petition under 37 CFR 1.137(a) must be accompanied by:

(1) the required reply, unless previously filed; In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional utility or plant application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(l);

(3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and
(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

²Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition filed under the provisions of 37 CFR 1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof. In an application abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

(2) the petition fee as set forth in 37 CFR 1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b).

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By FAX: (571) 273-8300

Telephone inquiries concerning this matter may be directed to the undersigned Petitions Attorney at (571) 272-3212.



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